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a duty not to weaken its surface. *Milburn* v. *Fowler* (1882) 27 Hun 568; *Haverstraw* v. *Eckerson* (1908) 192 N. Y. 54, 84 N. E. 578; *Benfieldside etc. Board* v. *Consett etc. Co.* (1887) 3 Ex. D. 54. Of course the holding as to contributory negligence was proper since the duty to guard is not absolute. *Sickles* v. *N. J. Ice Co.* (1897) 153 N. Y. 83, 46 N. E. 1042.

WILLS—CONDITION CREATING FORFEITURE—WAIVER BY PARTY ENTITLED.—Testator put in a will after a gift of property, a condition that if any legatee contest the will, his share should go over to the other legatees. All the legatees waived a breach of this condition and all contested. *Held,* the waiver was ineffective and there was an intestacy of all the property bequeathed. *South Norwalk Trust Co.* v. *St. John* (Conn. 1917) 101 Atl. 961.

A condition not to contest a will has been held to be subsequent, *Bradford v. Bradford* (1869) 19 Oh. St. 546, or to create a gift on conditional limitation if there is a bequest over on breach of the condition. *Chew's Appeal* (1863) 45 Pa. 228; *cf. Fox* v. *Phelps* (N. Y. 1838) 20 Wend. 437. Although the courts do not favor the defeasance of vested estates, still, where the intention of the testator is clear, and there has been a real breach, such intention will govern. 2 Jarman, Wills (6th ed.) 1476. In the case of a pure condition subsequent, a breach thereof, will not create a forfeiture until re-entry by the heirs of the testator. 2 Reeves, Real Property, 1015. Therefore, the heirs of the testator, entitled after breach and re-entry, may waive the performance of the condition and clear the estate. *Andrews* v. *Senter* (1851) 32 Me. 394. It would follow, in a gift on conditional limitation, that any other person entitled to the estate after breach could waive performance. *Bowden* v. *Walker* (1874) 63 Tenn. 600; *cf. Drennen* v. *Heard* (D. C. 1912) 198 Fed. 414; see Fearne, Contingent Remainders (1st Am. ed.) 423. Moreover, it has been held that the party entitled to the benefit of the performance, as in a condition to support, may by words or conduct waive such condition and thereby avoid a forfeiture. *Rush* v. *Rush* (1872) 40 Ind. 83; *Alexander* v. *Alexander* (1900) 156 Mo. 413, 57 S. W. 110. But in those cases where there is an agreement between legatees to set aside a will, it will not be enforced unless it clearly appears that the testator's intention is not defeated thereby. *Walker* v. *Hollister* (1917) 20 Oh. N. P. (N. S.) 227. It would seem also that if the will had contained a clause expressly forbidding a waiver of the condition not to contest there would be a valid public policy in construing such clause as a restraint on the alienation of the gift over to the party first entitled. For if there had been such a restraint as a condition to the gift over, the court could have enforced it since it was a restraint on alienation to a particular person. Gray, Restraints on Alienation (2nd ed.) 32. Consequently, if such a condition can and ought to be implied, the decision in the principal case should follow.

WILLS—CONDITION NOT TO CONTEST.—A testator bequeathed certain legacies and stipulated that in case of the will being contested the share of the contesting legatee should be given to the other legatees. All the legatees joined in the contest. *Held,* in the absence of probable cause for the contest, the condition would be enforced. *South Norwalk Trust Co.* v. *St. John* (Conn. 1917) 101 Atl. 961.

The distinction between bequests and devises, as to the effect of